CHAN WON LOONG & ANOR

v.

NG YAN LING

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[CIVIL APPEAL NO: KCH-12B-14-4-2012]
20 SEPTEMBER 2012

BANKING: *Securities for advances - Charge - Foreclosure - Auction of property - Property badly damaged and in uninhabitable state - Whether successful bidder may claim repair costs and loss of rental from previous owner - Whether sale is on 'as is where is' basis - Whether successful bidder prevented from claiming by estoppel and principle of accord and satisfaction*

CIVIL PROCEDURE: *Interest - Interest on judgment sum - Post judgment interest reduced from 8% to 4% per annum*

CIVIL PROCEDURE: *Judgments and orders - Consent judgment - Suit for vacant possession and damages by purchaser against previous owner of foreclosed condominium unit - Suit withdrawn with vacant possession delivered and parties having no further claim against each other - Property badly damaged and in uninhabitable state - Whether purchaser may commence fresh action to claim repair costs and loss of rental - Whether fresh action prohibited by estoppel - Whether fresh action prohibited by principle of accord and satisfaction*

The two appellants ('the Chans') were co-owners of a condominium unit which was foreclosed by the bank and auctioned off to the respondent. The Chans then filed a suit action against the bank and the respondent claiming that the foreclosure and auction were null and void. The respondent counterclaimed for vacant possession and damages. This suit was settled out of court wherein it was agreed that the suit be withdrawn and that the Chans deliver vacant possession of the property to the respondent and that there shall be no further claim against each other. Following this settlement, the respondent took vacant possession of the property only to find out that it was badly damaged and was in an uninhabitable state. The respondent thus filed an action against the Chans to claim the repair costs and loss of rental. The learned Sessions Court Judge allowed the respondent's claim and hence this appeal by Chans against that decision. The Chans also appealed against the rate of interest awarded.

Held (allowing appeal with costs):

(1) The interest rate of 8% was amended to 4% *vide* PU(A) 211/2011 and it came into effect on 1 March 2011. The judgment having been delivered on 5 April 2012, after O. 29 r. 12 of the Subordinates Court Rules 1980 had been amended, the post judgment interest must be 4% per annum until full settlement. (para 5)

(2) The condominium unit was inhabitable. However, the Chans should not be liable for the extensive damage to the property because: (i) the property was an auctioned property and there was no evidence to show what state it was in prior to or at the time the negotiation for the earlier suit action was brokered. Therefore, it was only reasonable that the sale and possession of it be on an 'as is where is' basis; (ii) although the settlement of the suit with the Chans was in respect of the issue of vacant possession of the property but yet despite her shock at these extensive damage, she proceeded to file the notice of discontinuance. In the settlement agreement the respondent declared that she agreed not to have any further claim against the Chans. Hence, both estoppel and the principle of accord and satisfaction applied to bar the respondent from making any further claims against the Chans. (paras 6, 7 & 8)

Legislation referred to:
Contracts Act 1950, s. 64
Subordinates Court Rules 1980, O. 29 r. 12

For the appellant - Norman Liew Hock Zee; M/s Chong Brothers Advocs
For the respondent - Josephine Ling; M/s Loke, King, Goh & Partners Advocs

Reported by Amutha Suppayah

JUDGMENT

Rhodzariah Bujang J:

[1] The two appellants in this appeal were co-owners of a condominium unit and I shall refer to them as the Chans. The purchase of the property was financed by United Overseas Bank Malaysia Berhad ("the bank") with a charge over the property as security. Upon defaults of the financing facilities granted, the bank terminated the financing

agreements and commenced foreclosure proceedings. An order for sale was obtained and following a public auction on 31 July 2009 the property was transferred to Ng Yan Ling, being the successful bidder.

[2] Four months later, on 26 November 2009, the Chans filed a suit action against the bank and Ng Yan Ling for, *inter alia*, a declaration that the recall of the financing facilities by the bank, the sale of the property to Ng Yan Ling be declared null and void and that they be entitled to remain in possession of it. Ng Yan Ling filed a defence and also counter-claimed for an order of vacant possession, damages to be assessed and mesne profit. This suit was finally settled out of court on seven terms but the relevant ones being:

(i) that there be withdrawal of the suit action,

(ii) that the Chans deliver vacant possession of the property to Ng Yan Ling;

(iii) that the Chans pay rental from November 2009 to April 2010 totalling RM3,000; and

(iv) that there shall be no further claim against each other.

[3] Following the execution of the settlement agreement on 21 April 2010 the keys to the property was duly delivered to Ng Yan Ling on 6 May 2010 by her counsel who received it from the Chans' counsel on 5 May 2010. But when Ng Yan Ling entered the condominium unit on 7 May 2010, she was shocked to see, she claimed, that the property was, in her counsel's words, in an uninhabitable state. The damage listed included the missing doors, sanitary fittings, lightings, pipings and the flooring material. The repairs to the property took five months, according to Ng Yan Ling which costs her RM57,431.10 and during which she deprived of rental of the property of RM10,000 (at RM2,000 per month). She was only able to move in to the condominium unit on 10 October 2010. Ng Yan Ling has therefore filed a summons in the Sessions Court against the Chans for the said cost of repairs, loss of rental or alternatively general damages. This she did after agreeing to discontinue the earlier suit action which notice of discontinuance was filed on 14 June 2010.

[4] The learned Sessions Court Judge agreed with her claim after a full trial but scaled down the cost of repairs to RM28,715.55 and the rental fees to only RM3,000 for six months. The Chans have appealed against that decision but there is no cross appeal against the reduction of the claim by Ng Yan Ling.

A **The Appeal**

[5] Before me the Chans' counsel, Mr. Norman Liew argued that the decision is flawed because by reason of the settlement agreement and discontinuance of the suit action, Ng Yan Ling must be estopped from filing a fresh action against the Chans. She is also barred from doing so based on the principle of accord and satisfaction under s. 64 of the Contracts Act 1950 having accepted payment of RM8,956.56 as agreed in the settlement agreement in satisfaction of her counterclaim filed against the Chans in the suit action. Their other two grounds of appeal relate to the assessment of damages and the award of rental by the learned Sessions Court Judge. The last ground of appeal is the rate of interest awarded on the judgment sum which was 8% per annum from the 7 May 2010 until full and final settlement. Without, a need for further deliberation, I would agree with this last ground because the interest rate of 8% was amended to 4% *vide* PU (A) 211/2011 and it came into effect on 1 March 2011. The judgment having been delivered on 5 April 2012, after the said O. 29 r. 12 of the Subordinates Court Rules 1980 has been amended, the post judgment interest must be 4% per annum until full settlement. On the other grounds, my consideration is as follows.

Satisfaction Of The Claim

[6] When I examined the list of damage to the property and the photographs exhibited at the trial, no one in the right mind would disagree with her that the condominium unit was inhabitable, by the mere fact that the bedroom doors, window frames and sanitary fittings were missing. A reasonable person is entitled to hold that view as no way could the damage be justified as to be just wear and tear from the passage of time. However, what moved me to agree that the Chans should not be liable for the extensive damage to the property are these.

[7] Firstly, the property was an auctioned property and there was no evidence to show what state it was in prior to or at the time the negotiation for the earlier suit action was brokered. Therefore, it is only reasonable that the sale and possession of it be on an 'as is where is' basis as there is no evidence to prove that the Chans had intentionally damaged it after the successful action sale.

[8] Secondly, although the settlement of the suit with the Chans was in respect of the issue of vacant possession of the property but yet despite her shock at these extensive damage, she proceeded to file the notice of discontinuance a month later, on 14 June 2010. It needs to be

repeated that in the settlement agreement Ng Yan Ling's declared that she agrees not to have any further claim against the Chans. Having seen the terrible state the property was in but yet agreeing to file the notice of discontinuance, Ng Yan Ling Yan Ling's action has rightly represented to the Chans that there indeed will be no further claim against them in respect of the property. I agree that both estoppel and the principle of accord and satisfaction apply in this case to bar Ng Yan Ling from making any further claims against the Chans. However, assuming that I was wrong in not finding the Chans liable for the damage to the said property, I would next consider the appeal on the damages assessed by the learned Sessions Court Judge.

Damages

[9] The learned Sessions Court Judge deducted 50% off Ng Yan Ling's original claim as stated in her summons and I am not minded to disturb his assessment because, of the eighteen suppliers who were instrumental in the repairs to the home, only ten gave evidence. Their witness statement are at pp. 121-139 of the appeal record volume 1 and they all confirmed being paid for the materials supplied and for the work done to the property. The total claim of these witnesses far exceeded the damages awarded by the learned Sessions Court Judge who did not take the trouble to total them up. However, since there is no cross-appeal on the quantum of damages, I have no alternative but to allow it to remain.

[10] Even though there is justification that the compensation was not properly assessed and even when I agree that the figure was "plucked from the air" as submitted by the Chans' counsel, it was in fact conjured up by the learned Sessions Court Judge to their benefit.

[11] As for the rental, the sum of RM500 per month being awarded by him based on the earlier rate agreed in the settlement agreement is fair. That rate was what Ng Yan Ling agreed the Chans pay her for being deprived of the use of the property prior to the settlement and it should reasonably hold for the period after it since she could not produce any evidence to show that she had a potential tenant who is willing to rent the properties from her at the rate of RM2,000 per month claimed by her in the summons.

[12] However, for the reasons given earlier on, I would allow the appeal with cost of RM15,000 here and below.